No. 07-____

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal district court has "ancillary" subject matter jurisdiction, after a judgment for money damages has been fully satisfied, to issue an anti-suit injunction barring foreign litigation.

2. Whether a federal district court exercising its limited authority under the treaty governing enforcement of international arbitration awards may issue an anti-suit injunction barring foreign litigation on the ground that the district court views the foreign lawsuit as seeking to relitigate matters decided in the underlying arbitration that were never considered or decided in the federal court.

3. Whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina (Persero), Respondent-Appellant;

Karaha Bodas Company, L.L.C., Petitioner-Appellee; and

Ministry of Finance of the Republic of Indonesia, Interested Party.

Pursuant to Supreme Court Rule 29.6, Petitioner PT Pertamina (Persero), formerly known as Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, states that it is wholly owned by (but a separate juridicial entity from) the Government of the Republic of Indonesia.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 07-____

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PT Pertamina (Persero) respectfully petitions this Court for a writ of certiorari to review the judgment entered on September 7, 2007 by the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 500 F.3d 111 (2d Cir. 2007), and is reproduced in the Appendix ("App.") at 1a. The opinion of the United States

District Court for the Southern District of New York is reported at 465 F. Supp. 2d 283 (S.D.N.Y. 2006) and is reproduced in the Appendix at 47a. The judgment of the United States District Court for the Southern District of New York is unreported and is reproduced in the Appendix at 42a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 7, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, codified at 9 U.S.C. §§ 201-208, is reproduced in the Appendix at 287a.

The All Writs Act, 28 U.S.C. § 1651(a), states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The supplemental jurisdiction statute, 28 U.S.C. § 1367(a), provides in relevant part:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The full text of 28 U.S.C. § 1367 is reproduced in the Appendix at 298a.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York entered a broad anti-suit injunction against PT Pertamina (Persero) ("Pertamina") precluding it, among other things, from prosecuting a lawsuit seeking damages for fraud in the Grand Court of the Cayman Islands – or anywhere else in the world – against Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands special-purpose corporation. The Second Circuit affirmed the anti-suit injunction in substantial part, in an opinion that conflicts with decisions of other federal circuits in no fewer than three significant respects.

The matter in which the New York district court issued the anti-suit injunction was KBC's proceeding to execute on a Texas district court's judgment

confirming an international arbitration award. When the district court issued the injunction, proceedings were otherwise concluded and the full money judgment had been paid. The court's exercise of ancillary jurisdiction to issue and maintain the injunction after satisfaction of the judgment contradicts a recent decision of the Eighth Circuit on the identical issue, *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). *Goss* is the subject of a separate petition for certiorari that we understand is being filed with this Court.

The Texas district court judgment, upon which the New York enforcement proceeding was based, confirmed KBC's international arbitration award pursuant to a summary proceeding dictated by an international treaty. Neither district court – indeed, no U.S. court – had occasion to consider the merits of the fraud claims that Pertamina asserted in the Cayman Islands. In concluding that the narrow U.S. enforcement proceedings could be a basis for enjoining foreign litigation, the Second Circuit directly contradicted an earlier Fifth Circuit decision arising out of this dispute.

In affirming the anti-suit injunction, moreover, the Second Circuit contributed to a pervasive conflict within the circuit courts regarding the standard for enjoining foreign litigation. Such injunctions signal profound disrespect for foreign courts, and are thus an affront to vital interests of international comity. This Court should limit their use to the rarest of circumstances.

A. The Arbitration Award and the Proceedings Below

Pertamina is an Indonesian state-owned corporation charged with exploring and exploiting geothermal energy resources in Indonesia. KBC contracted with Pertamina to locate geothermal resources in West Java and to sell electricity generated thereby ("the Project"). App. 4a. The Indonesian currency collapsed in 1997, and the Government of Indonesia suspended the Project.

In the period surrounding suspension of the Project, KBC submitted to Pertamina two Notices of Resource Confirmation and a Notice of Intent to Develop (collectively, the "Notices"), which Pertamina now believes were fraudulent. The first Notice (in September 1997) purported to confirm 75 MW of geothermal resources, C.A. App. A-679 ¶¶ 33-35; the second (three months later) asserted that KBC had confirmed sufficient geothermal resources that it reasonably expected to collect 210 MW of geothermal energy, *id.* at A-878 ¶ 40.

KBC subsequently commenced international arbitration proceedings. In December 2000, a Swiss arbitral tribunal issued a Final Award in favor of KBC against Pertamina, awarding $261,166,654.92.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention" or "Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 3, codified at 9 U.S.C. §§ 201-208, a tribunal's award is not self-executing but may be enforced by the courts of any signatory jurisdiction. KBC left no stone unturned in this

regard, filing enforcement proceedings in Hong Kong, Singapore, Canada, and the United States. App. 9a.

KBC filed its United States proceeding in the U.S. District Court for the Southern District of Texas. Pertamina opposed enforcement of the award on various grounds, most of them procedural. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 294-307 (5th Cir. 2004), reproduced at App. 88a. Pertamina did not assert (because it did not then have proof) that KBC's Notices had fraudulently misrepresented the extent of geothermal resource that KBC had confirmed.

In December 2001, KBC obtained an order from the Texas court confirming the arbitration award. In February 2002, while that order was under appeal,[1] KBC filed the action below in the Southern District of New York to register the Texas judgment and commence execution proceedings. App. 10a.

The proceeding below, therefore, was limited to identifying funds held by Pertamina in New York and ordering their turnover, pursuant to the registered judgment. App. 52a-55a. The parties disputed whether Pertamina or the Government of Indonesia owned the funds within twenty-four bank accounts. Ultimately, funds were identified in New York bank accounts sufficient to cover the

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[1] The Texas district court's confirmation order ultimately was affirmed, *Karaha Bodas*, 364 F.3d 274, and this Court denied Pertamina's petition for a writ of certiorari in October 2004. *PT Pertamina (Persero) v. Karaha Bodas Co.*, 543 U.S. 917 (2004).

outstanding amount of the arbitration award. App. 63a-64a.

B. The Fifth Circuit's Decision Reversing KBC's Prior Anti-Suit Injunction

The anti-suit injunction appealed from is not the first that KBC has sought against Pertamina. Concurrent with the New York enforcement proceedings, KBC unsuccessfully pursued an anti-suit injunction in the Texas proceedings, seeking to enjoin an annulment action that Pertamina filed in Indonesia. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 359-60 (5th Cir. 2003), reproduced at App. 155a. The Texas district court granted KBC's request, preliminarily enjoining Pertamina from seeking injunctive relief in the Indonesian action. *Id.* at 362.

The Fifth Circuit reversed the anti-suit injunction. The court articulated three reasons of particular importance here: *First*, under the New York Convention, a final order enforcing an arbitration decision is "not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions." *Id.* at 372. *Second*, it is not the job of a federal court, charged only with enforcing a foreign arbitration award, "to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it." *Id.* at 369.

Third, enjoining a party in an international arbitration enforcement proceeding is especially dangerous to the comity concerns at the core of the Convention. *Id.* at 372-73.[2]

C. Pertamina Uncovers Proof of KBC's Fraud and Files Suit in the Cayman Islands.

The documents underlying Pertamina's fraud claim first came to its attention in August 2005, when Pertamina's new Singapore counsel discovered twelve boxes of KBC documents that KBC's ex-staff had sent to Pertamina in November 2002. C.A. App. A-692 ¶ 70(b); A-1109; A-1845. The documents demonstrate that KBC knew it had not proven the geothermal resource it claimed in the Notices. Indeed, the documents reveal that at the time of the September 1997 Notice, KBC could not truthfully confirm 75 MW of geothermal resources; and that no meaningful additional drilling activity occurred before the December 1997 Notices, which predicted a 210 MW facility. *See id.* at A-701-10 ¶¶ 85-113; A-1168-1206.

By August 2005, the Texas confirmation action had concluded, and the New York turnover proceeding involved merely execution of the Texas judgment. *See* App. 10a. Pertamina therefore sought to raise the fraud claim in connection with KBC's then-pending enforcement proceedings in

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[2] On March 8, 2004, Indonesia's Supreme Court determined that Indonesian courts lacked jurisdiction over the annulment action. C.A. App. A-468.

Singapore and Hong Kong. Those attempts proved unavailing because KBC dismissed its Singapore proceeding and successfully postponed its Hong Kong proceeding.[3] Pertamina therefore filed a lawsuit for fraud in the Cayman Islands, where KBC itself is incorporated and cannot complain of being sued.

In the Cayman lawsuit, Pertamina claimed that KBC committed fraud in (a) sending Pertamina the Notices, and (b) submitting the Notice of Arbitration and procuring an arbitration award predicated on fraudulent representations. Pertamina sought damages as a result. C.A. App. A-1598 ¶¶ 6-7. It also sought equitable relief, including a preliminary injunction to prevent KBC from dissipating assets and, if successful at trial, an injunction preventing further enforcement of the arbitration award because it had been "vitiated" by fraud. *Id.*

D. The Anti-Suit Injunction and the Second Circuit Decision

Rather than defend against the Cayman action on the merits, or on grounds of res judicata or collateral estoppel, KBC instead moved the New York district court on September 21, 2006 for an anti-suit injunction prohibiting Pertamina from prosecuting the Cayman action or any similar proceeding worldwide. By this time, the turnover proceedings in the district court were largely completed; this Court denied certiorari on October 2, 2006, *PT Pertamina*

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[3] On October 9, 2007, the intermediate appeals court in Hong Kong ruled against Pertamina; Pertamina has filed a notice that it will seek to appeal to Hong Kong's highest court.

(Persero) v. Karaha Bodas Co., 127 S. Ct. 129 (2006), and the district court issued final turnover orders on October 6 and November 15. Pertamina promptly complied with these orders and the judgment was fully satisfied. App. 63a-64a.

On December 8, 2006, the district court released an Opinion granting KBC's motion for a global permanent anti-suit injunction. App. 47a. The district court's final order permanently enjoins Pertamina from (among other things) pursuing its fraud claims in the Cayman Islands action or in any other court or tribunal. App. 43a-45a.

Pertamina timely appealed to the Second Circuit from the anti-suit injunction.[4] Meanwhile, the Eighth Circuit decided *Goss*, which held under analogous circumstances that a district court lacked ancillary jurisdiction to enjoin a foreign lawsuit after payment of the judgment. 491 F.3d at 368-69. The Second Circuit ordered supplemental briefing in light of *Goss*.

In an opinion dated September 7, 2007, the Second Circuit affirmed the district court's anti-suit injunction with minor modifications. Disagreeing with the Eighth Circuit, the court held that federal district courts have ancillary jurisdiction to enjoin foreign litigation even after payment of a judgment. The Second Circuit further held that, under the standard first articulated in *China Trade &*

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[4] The district court entered a stay pending appeal, requiring KBC to hold disputed funds Pertamina had paid pursuant to the final turnover orders. The Second Circuit on February 13, 2007 lifted that stay, and this Court denied Pertamina's emergency application the next day. KBC has disbursed the funds. App. 15a.

Development Corp. v. M.V. Choong Yong, 837 F.2d 33, 35-36 (2d Cir. 1987), the anti-suit injunction was appropriate. App. 19a-35a.

Characterizing the Cayman action as a challenge to the arbitration award, the court reasoned that the U.S. enforcement proceedings were "dispositive" of the issues in the Cayman lawsuit – a threshold requirement of the *China Trade* test. App. 22a. The court acknowledged that the Fifth Circuit's decision reversing KBC's prior anti-suit injunction had held that the U.S. court, acting as a secondary-jurisdiction tribunal under the New York Convention, does not have the same interest in protecting its judgments from international interference as it does in the typical case it adjudicates. App. 26a-27a. The Second Circuit sought to distinguish the Fifth Circuit's decision, however, on the ground that (a) since the Fifth Circuit's decision, additional federal judgments enforcing KBC's award had been entered, and (b) as the court saw it, the Cayman Islands has "no arguable basis for jurisdiction to adjudicate rights and obligations of the parties with respect to the [arbitration award]." App. 28a-31a.

The Second Circuit further determined that the anti-suit injunction was warranted because (a) the Cayman action interferes with the jurisdiction of the U.S. courts, (b) the Cayman action impairs the important public policy in favor of arbitration, and (c) the Cayman action is "vexatious." App. 31a-34a.

In affirming the injunction, the Court "modif[ied] it slightly to clarify that [it] has no effect on confirmation proceedings contemplated by the New York Convention in other jurisdictions." App. 41a. The Court also noted that Pertamina, were it to

identify a good-faith basis to pursue annulment litigation in Switzerland, could return to the New York district court for permission to seek such relief. *Id.* Neither "modification" permits Pertamina to pursue its affirmative damages claim for fraud.[5]

REASONS FOR GRANTING THE WRIT

This Petition presents three separate but related issues as to which the federal circuits are in conflict. These significant issues, severally or in combination, warrant certiorari.

The Eighth and Second Circuits have reached opposite conclusions regarding whether, after an award of damages has been satisfied, a federal court retains ancillary subject matter jurisdiction to enjoin proceedings. The Eighth Circuit's view is consistent with this Court's recent ancillary jurisdiction opinions: after satisfaction of the judgment, ancillary jurisdiction is lacking. The Second Circuit rejected this reasoning.

The Second Circuit's holding also conflicts with the Fifth Circuit's decision regarding the propriety of a New York Convention enforcement court issuing an anti-suit injunction. Enforcement proceedings under the Convention are summary in nature, and sharply

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[5] The anti-suit injunction required Pertamina to dismiss its Cayman action. The Second Circuit denied a stay, and the Cayman action accordingly has been dismissed. In the event the Court grants certiorari and the anti-suit injunction ultimately is reversed, Pertamina may seek leave to re-file its Cayman action or may file suit elsewhere to pursue its fraud claim.

restrict the grounds on which a defendant can object. Nevertheless, and despite the Fifth Circuit reversing an anti-suit injunction in fundamentally indistinguishable circumstances, the Second Circuit treated the enforcement and execution proceedings in this case as judgments on the merits.

Finally, the Second Circuit's decision contributes to the widespread confusion among the circuit courts regarding the proper standard to be applied in considering whether to issue an anti-suit injunction. Nine circuits have articulated various standards, which fall into at least three discrete and irreconcilable approaches. The circuits' respective tests differ most dramatically as to how much respect is afforded to the interest of international comity.

This Court should swiftly resolve these disagreements. As the world economy grows, international litigation is becoming both more sophisticated and widespread. Judging by the many recent court decisions, *see infra*, litigants are increasingly turning to preemptive anti-suit injunctions. Yet, as the global marketplace increases in size, the need to respect foreign tribunals must keep pace. This is nowhere more evident than in lawsuits arising out of the New York Convention. U.S. litigants and U.S. courts rely on the mutual goodwill among signatory nations to adjudicate disputes fairly and respect previous rulings.

No less pressing is the need to ensure that the limits of federal subject matter jurisdiction are well understood and consistently applied. The Second Circuit's decision greatly expands ancillary jurisdiction by allowing federal courts to continue exercising control over parties whose business before

the courts has concluded – and consequently, to exercise control over proceedings in foreign courts. Ancillary jurisdiction, as this Court's prior decisions make clear, should be limited to what is necessary for the court's function. The post-judgment anti-suit injunction entered by the district court most assuredly was not within the narrow range of situations for which ancillary jurisdiction is reserved.

In short, a writ of certiorari should be granted to clarify the breadth of post-judgment ancillary jurisdiction and to determine the standards under which a district court may enjoin foreign litigation.

I. THE SECOND AND EIGHTH CIRCUITS ARE IN CONFLICT REGARDING THE "ANCILLARY" JURISDICTION OF A DISTRICT COURT TO ENJOIN PROCEEDINGS AFTER SATISFACTION OF A JUDGMENT.

The Second Circuit's decision in this case squarely conflicts with the Eighth Circuit's decision in *Goss*, 491 F.3d 355, on an important question of federal subject matter jurisdiction. In *Goss*, which we understand is before this Court on petition for certiorari, the Eighth Circuit reversed a district court's anti-suit injunction against a foreign action that the court perceived to be a threat to its jurisdiction. The Eighth Circuit held that "the district court retained ancillary enforcement jurisdiction [only] *until* satisfaction of the judgment," *id.* at 365, and because the judgment had been paid, the anti-suit injunction could not stand, *id.* In contrast, the Second Circuit held, after specifically

considering *Goss*, that the New York district court had ancillary jurisdiction to restrain foreign litigation even after Pertamina had paid the judgment. App. 37a-38a. This Court should grant certiorari to resolve this circuit split and to decide the important question of whether post-judgment anti-suit injunctions are within federal courts' ancillary subject matter jurisdiction.

A. The Eighth Circuit Holds that Ancillary Jurisdiction Does Not Extend to Post-Judgment Anti-Suit Injunctions.

In *Goss*, a United States company obtained a damages judgment against a Japanese manufacturer under the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004). 491 F.3d 356. The Japanese company then informed the district court that it intended to file suit in Japan under a "claw back statute" under which the company could recover as damages the amount of any judgment against it under the U.S. Antidumping Act. The United States company sought an anti-suit injunction from the federal district court. *Id.* at 359. As in this case, the prevailing party in *Goss* argued that the foreign action would undo the effects of the domestic judgment it had obtained. *Id.* The district court agreed, holding that the Japanese action was "a direct attack on this court's judgment in favor of Goss and a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole." *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 435 F. Supp. 2d 919, 929 (N.D. Iowa 2006).

The Eighth Circuit reversed. The court first observed that while anti-suit injunctions are authorized by the All Writs Act, 28 U.S.C. § 1651(a), "the Act does not create an independent source of federal jurisdiction." 491 F.3d at 364. Prior to payment of the judgment, the *Goss* court reasoned, the district court had jurisdiction to enjoin the Japanese company from pursuing the foreign litigation. *Id.* at 365. Once the judgment was paid, however, "the jurisdictional circumstances . . . changed because there [was] no longer an outstanding judgment to protect." *Id.* at 368. The *Goss* court concluded that "[n]either the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction . . . under these circumstances." *Id.* at 365. The Eighth Circuit relied on this Court's decision in *Peacock v. Thomas*, 516 U.S. 349 (1996), which "caution[ed] against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief [sought is] of a different kind or on a different principle than that of the prior decree." *Id.* at 358 (internal quotation marks and citation omitted).

B. The Second Circuit's Decision Squarely Disagrees with the Eighth Circuit's, Creating a Circuit Split on a Significant Issue of Subject Matter Jurisdiction that This Court Should Resolve.

The decision below specifically addressed, at some length, the Eighth Circuit's *Goss* decision – and unambiguously disagreed. App. 37a-38a. Recognizing that, as in *Goss*, the district court's judgment had been paid and its proceedings were at an end, the Second Circuit nonetheless upheld the anti-suit injunction, reasoning that "federal courts have continuing jurisdiction, grounded in the concepts of *res judicata* and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court." App. 38a. The Second Circuit emphasized that "[t]his source of jurisdiction remains *even after a judgment has been satisfied* . . . ." *Id.* (emphasis added). The court made no attempt to reconcile its holding with *Goss*, and indeed, they are irreconcilable.

The present case is a perfect opportunity for this Court to resolve this clear circuit split on an issue of critical importance to the federal courts. As the number of lawsuits waged in multiple countries grows with the ever-expanding global economy, U.S. courts are likely to face increasingly complicated litigation postures that raise thorny jurisdictional issues. Just so here: the Eighth and Second Circuits faced the identical jurisdictional question within months of each other and reached opposite conclusions.

In addition to its international character, this case warrants certiorari to address the scope – if any – of a court's ancillary jurisdiction after a judgment has been satisfied. Ancillary jurisdiction is a species of subject matter jurisdiction, which goes to the heart of the judicial power. *See Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). The presence of jurisdiction is the "first and fundamental question'" in any action or appeal, and is an issue that a federal court is "'bound to ask and answer for itself, even when not otherwise suggested." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). In part because of the central importance of subject matter jurisdiction, the scope of ancillary jurisdiction is a recurring and confounding problem in the lower federal courts. Indeed, the Second Circuit below commented that the caselaw on the topic was "hardly a model of clarity." App. 38a (quoting *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006)); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) ("The doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise . . . ."). For these reasons, this Court's guidance is especially necessary to "carefully guard[ ]" against the federal courts' expansion of their own power. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951).

C. The Second Circuit's Judgment Is Incorrect and Should Be Reversed.

The district court lacked ancillary jurisdiction to maintain its anti-suit injunction. Federal courts are

to "presume[] that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citation omitted). This Court accordingly has limited ancillary jurisdiction to two instances: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80 (citations omitted). In this case, the district court's injunction cannot be justified on grounds of "factual[] interdependen[ce]" because this basis for ancillary jurisdiction applies only prior to judgment. *Peacock*, 516 U.S. at 355 ("once judgment was entered," the ability of a single court to resolve "factually intertwined issues vanished").

Following satisfaction of a judgment, therefore, ancillary jurisdiction to issue an anti-suit injunction may be justified only if the injunction enables a district court to "function successfully." This basis for ancillary jurisdiction too is exceedingly narrow and does not extend to the anti-suit injunction in this case. In *Kokkonen*, the Court held that there was no ancillary jurisdiction over an alleged violation of a settlement agreement after the district court had dismissed the case. 511 U.S. at 380-81. In *Peacock*, the Court found no ancillary jurisdiction over claims brought by a judgment creditor to collect against an officer and shareholder of the judgment debtor who had transferred the assets to himself. 516 U.S. at 356-59. When, in the past, this Court has found ancillary jurisdiction to enjoin a proceeding following entry of judgment, the judgments were ongoing orders in need of continued protection. *See Dugas v.*

Am. Sur. Co. of N.Y., 300 U.S. 414, 428 (1937) (modifying closely related injunction to enjoin related proceeding); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (protecting bankrupt person from subsequent suit regarding debt for which he received bankruptcy protection); *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880) (following equitable suit in replevin assigning ownership of property, enjoining attempt to recover "the equivalent to an actual return of the replevied property").

In the recent *Kokkonen* and *Peacock* decisions, this Court emphasized that ancillary jurisdiction extends only to matters truly necessary to protect the court's authority to manage the proceedings before it. In rejecting jurisdiction to adjudicate violation of a settlement agreement, *Kokkonen* limited enforcement jurisdiction to "what courts require in order to perform their functions." 511 U.S. at 380. Because the agreement was not incorporated in the district court's dismissal order, the order was "in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id.* The *Peacock* Court observed that ancillary jurisdiction over supplemental proceedings was strictly limited. "Our recognition of these supplementary proceedings has not . . . extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment." 516 U.S. at 357. In so holding, the *Peacock* Court recognized that this might mean that some judgments would not be paid. *Id.* at 359 ("The Rules cannot guarantee payment of every federal judgment."). But as long as a federal court "protect[s] a judgment creditor's ability to execute on a judgment, the district court's authority is adequately preserved." *Id.*

These recent decisions are consistent with 28 U.S.C. § 1367, which confers supplemental jurisdiction over disputes that "form part of the same case or controversy under Article III of the United States Constitution" as the claims for which there is original jurisdiction. *Id.* This Court recently emphasized that, for Article III purposes, a case or controversy must "admi[t] of *specific relief* through a decree of a *conclusive character*." *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (emphases added) (quotation omitted). When a judgment calls for money damages, and that judgment is paid, the case or controversy is concluded. Any further dispute between the parties, especially one seeking an entirely different kind of relief, such as an anti-suit injunction, is not part of the same case or controversy. *See Peacock*, 516 U.S. at 358 (expressing caution for exercises of ancillary jurisdiction over subsequent disputes premised on a different principle or seeking different forms of relief).

Applying these precedents to this case, the district court lacked ancillary jurisdiction. After adjudicating a narrow proceeding regarding the ownership of certain bank accounts, the district court ordered the turnover of money damages. The judgment included no ongoing injunctive relief, and the district court's judgment accordingly was fully effectuated when the money was paid. *See Goss*, 491 F.3d at 368 n.9 (payment of a money judgment ends need for ancillary enforcement jurisdiction). The district court itself recognized that the judgment was "finally satisfie[d]." App. 63a. Accordingly, the district court's turnover order would not be "flouted or imperiled," *Kokkonen*, 511 U.S. at 380, by

Pertamina's Cayman lawsuit for damages. In contrast to the Second Circuit below, the Eighth Circuit in *Goss* correctly concluded that, having taken the steps to ensure that the judgment was satisfied, the district court's ancillary enforcement jurisdiction was at an end and the anti-suit injunction was improper.

II. THE SECOND AND FIFTH CIRCUITS ARE IN CONFLICT REGARDING ANTI-SUIT INJUNCTIONS ISSUED BY COURTS EXERCISING SECONDARY JURISDICTION UNDER THE NEW YORK CONVENTION.

The Second Circuit held that the federal judgments at issue – the Texas district court's confirmation of the arbitral award and the New York district court's enforcement of it – were "dispositive" of Pertamina's Cayman Islands fraud claims and justified an anti-suit injunction. App. 22a. The court so held even though the Texas and New York district courts never heard or decided the merits of those claims.[6] *See id.* The Second Circuit reasoned,

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[6] The Second Circuit noted that the Fifth Circuit, in affirming the Texas district court's confirmation order, considered a claim by Pertamina that the arbitration award was procured by fraud. App. 23a. That claim had nothing to do with Pertamina's fraud claim presented in the Cayman Islands. Rather, the Fifth Circuit examined whether KBC's failure to disclose a political insurance policy provided a basis for refusing to enforce the award as contrary to public policy under Article V(2)(b) of the Convention. *Karaha Bodas*, 364 F.3d at 306-07. That court never considered the fraud allegations relating to KBC's Notices raised in the Cayman proceeding.

because Pertamina's fraud claims were (so it found) decided in the Swiss arbitration,[7] and the arbitral ruling was enforced by the U.S. federal courts, those courts had "actually decided" the claims raised in the Cayman action. *Id.* The Second Circuit thus regarded the federal courts' confirmation and enforcement orders under the Convention as equivalent to a federal adjudication on the merits of all of the issues in the underlying arbitral proceeding – even issues that the federal courts never heard or decided.

The Second Circuit's holding directly conflicts with the Fifth Circuit's conclusion, in the prior proceeding between these parties, that the Texas district court's anti-suit injunction was improper in light of the court's limited role under the New York Convention. *See Karaha Bodas*, 335 F.3d 357. The Fifth Circuit reasoned that confirmation and enforcement proceedings in courts of secondary jurisdiction are *not* judgments on the merits, are not necessarily entitled to res judicata effect, and do not imbue a federal court with the same interest in protecting its judgments as would the typical case. *Id.* at 366-73. In addition to creating a circuit conflict, the Second Circuit's decision represents an unprecedented assertion of federal authority in the international arbitration context, an arena in which anti-suit injunctions are particularly inappropriate

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[7] This issue was vigorously contested below, and Pertamina believes the Second Circuit erroneously determined that Pertamina's fraud claims were decided in the Swiss arbitration. App. 23a. While Pertamina argued that KBC's damages claims were grossly inflated, it did not assert an affirmative claim for fraud, nor did it then possess the documents that underlie its claims in the Cayman action. App. 50a-51a; C.A. App. A-1636.

and offensive to international comity. As this Court has emphasized, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985).

A. The Fifth Circuit Held that an Anti-Suit Injunction Was Inappropriate in Light of the Limited Role of a U.S. Court Acting as a Secondary Enforcement Jurisdiction Under the Convention.

The Fifth Circuit typically applies a permissive standard for issuing anti-suit injunctions against foreign proceedings. *See infra*, part III.B; *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996). It applies a very different standard, however, to anti-suit injunctions issued from Convention enforcement proceedings. In *Karaha Bodas*, an earlier proceeding between these parties described at pp. 7-8, *supra*, the Fifth Circuit properly looked to the structure of the Convention to determine whether to enjoin Pertamina's Indonesian annulment proceeding. *See* 335 F.3d at 368.

First, the Fifth Circuit noted that the Convention "assign[s] different roles to national courts to carry out the aims of the treaty." *Id.* A "primary jurisdiction" is one in which, or under the law of which, an arbitral award is made; a "secondary jurisdiction" is one in which recognition and

enforcement of an award is sought. *Id.* at 364. To establish a *prima facie* basis for enforcement in a secondary jurisdiction, the recipient of the award need only present the authenticated award and the original arbitration agreement to the enforcement court pursuant to Article IV of the Convention. *Id.* at 368. Once the litigant meets that requirement, the court of secondary jurisdiction *must* enforce the award unless the party opposing enforcement establishes one of seven narrow grounds to refuse enforcement. 9 U.S.C. § 201, note, Art. V; *see Karaha Bodas*, 335 F.3d at 368; *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307 (3d Cir. 2006) (secondary jurisdiction court's role "is limited – it must confirm the award unless one of the grounds for refusal specified in the Convention applies"). "[T]he efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal . . . ." *Mitsubishi Motors*, 473 U.S. at 638.

Second, the Fifth Circuit observed that the Convention contemplates (as occurred here) that there will be multiple enforcement and/or nullification actions in jurisdictions worldwide, and courts considering the award are entitled "to conduct their own independent enforcement analyses." *Karaha Bodas*, 335 F.3d at 370. A district court's judgment under the Convention merely holds that the arbitration award is enforceable within the *United States*. *See id.* at 370. Accordingly, the integrity of a U.S. court's enforcement order is not threatened when other courts "address[] the same or similar legal bases against enforcement and confirmation." *Id.* at 370. For this reason, the decisions of the enforcement court are "not

necessarily given *res judicata* effect in foreign jurisdictions" because such decisions "only enforce[], or refuse[] to enforce, awards arbitrated elsewhere." *Id.* at 372 & n.59.

Accordingly, the Fifth Circuit reasoned, an anti-suit injunction issued by a court of secondary jurisdiction is "likely . . . to demonstrate an assertion of authority not contemplated by the . . . Convention." *Id.* at 373. Because of the structure of the Convention, an "order to enforce an award resulting from litigation elsewhere" is "*not truly a decision on the merits.*" *Id.* at 372 (emphasis added); *accord Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178 (3d Cir. 2006) (distinguishing enforcement of arbitral award under the Convention from an "adjudication on the merits").

B. The Second Circuit Held that It Was Appropriate To Issue an Anti-Suit Injunction To Protect the District Court's Enforcement of the Same New York Convention Arbitral Award.

Though acknowledging that the United States was operating as a secondary jurisdiction under the Convention, the Second Circuit nevertheless treated the district courts' confirmation and enforcement as decisions on the merits justifying an extraordinary anti-suit injunction. App. 22a-23a.[8] This conclusion

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[8] The Second Circuit modified the injunction so that it did not apply to litigation in Switzerland or confirmation proceedings under the Convention. *See* App. 28a-29a. This limitation in no way reconciles the court's ruling with the Fifth

is inconsistent with the limited function the U.S. district courts were allowed to and did perform – ensuring that the Article IV paperwork requirements were met and addressing Pertamina's objections on the limited grounds set forth in Article V.[9]

The Second Circuit's decision is directly in conflict with the Fifth Circuit's. While the Second Circuit treated the enforcement decision as a judgment on the merits that had "actually decided" any issues presented in the arbitration, *id.*, the Fifth Circuit reached the opposite conclusion and found that an enforcement judgment is not threatened even by a direct challenge to the underlying arbitration in a foreign jurisdiction. *Karaha Bodas*, 335 F.3d at 370. This Court's guidance is necessary to resolve this conflict over whether and under what circumstances a court of secondary jurisdiction can exercise its equitable authority to issue an anti-suit injunction against a foreign proceeding.

The Second Circuit suggested two bases for distinguishing the Fifth Circuit's contrary decision. Neither resolves the conflict. First, the Second Circuit suggested that the procedural posture of the two cases differed. *See* App. 28a. In the Fifth Circuit

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Circuit's, as the Second Circuit unquestionably would have enjoined the Cayman lawsuit even if it had been styled an "annulment" action, like the Indonesian action at issue in the Fifth Circuit case. Indeed, the New York district court's anti-suit injunction, as affirmed by the decision below, by its plain terms *would* enjoin an annulment action in the Cayman Islands or Indonesia. App. 43a-45a.

[9] The Fifth Circuit, in its later opinion affirming enforcement, noted that "[i]t is clear that the district court had secondary jurisdiction and considered *only whether to enforce the Award*." *Karaha Bodas*, 364 F.3d at 287 (emphasis added).

case, it noted, the Texas district court had only confirmed the award, whereas the New York district court had issued an enforcement order (based on that confirmation) for Pertamina to turn over $319 million. *Id.* The Second Circuit did not explain why a turnover order speaks more to the merits of the underlying arbitration than does a confirmation order; if anything, the New York proceeding had even less to do with the merits than did the Texas proceeding. In any event, the Fifth Circuit's ruling, that an "order to enforce an award resulting from litigation elsewhere" is "*not truly a decision on the merits*," *Karaha Bodas*, 335 F.3d at 372 (emphasis added), is equally applicable to either the New York or Texas proceeding.

Second, the Second Circuit distinguished the Fifth Circuit's decision on the ground that Pertamina had a "colorable argument" that the enjoined Indonesian proceedings may have been permissible under the Convention, while the Cayman proceeding enjoined by the New York district court was not brought under the auspices of the Convention. App. 29a-30a. But it is evident from the Fifth Circuit opinion that the "colorable argument" was not a factor in its decision. It held that the Indonesian action did not impinge on the Texas district court's confirmation and enforcement jurisdiction, even if that action were not authorized by the Convention, and even if that action were otherwise improper:

> [E]ven if the Indonesian court acted wrongly in its decision to annul the Award as a court of purported primary jurisdiction under the . . . Convention, we need not directly address the

> propriety of that court's injunction and annulment. Contrary to the district court's conclusions, legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other *enforcement jurisdictions for* that matter, to enforce a foreign arbitral award.

Karaha Bodas, 335 F.3d at 372.

C. This Court Should Grant Review To Resolve This Conflict and To Clarify the Circumstances (If Any) When an Enforcement Court May Enjoin Foreign Litigation.

While the conflict between the Second and Fifth Circuits arises from the present dispute, the significance of the courts' disagreement extends beyond this matter and affects all instances in which courts of secondary jurisdiction operating under the Convention consider anti-suit injunctions. Under the Second Circuit's decision, a court issuing a post-judgment order of confirmation or enforcement, following very limited review of the underlying arbitration, nevertheless can and should protect that order against foreign lawsuits as its own judgment on the merits affirming all aspects of the underlying arbitration. In the Fifth Circuit, by contrast, such a court must recognize its limited role under the Convention and, accordingly, must refrain from interfering with foreign proceedings pertaining to the arbitration. This Court should grant certiorari to

clarify the role of a court of secondary jurisdiction and the circumstances under which such a court can enjoin foreign litigation.

The Second Circuit's approach permits U.S. courts of secondary jurisdiction to impose their views on other courts worldwide, who otherwise would be empowered, and fully competent, to reach their own conclusions about the claims before them. This result conflicts with the narrow review power assigned to a court of secondary jurisdiction under Article V of the Convention, which requires that "substantive review at the award-enforcement stage remain minimal." *Mitsubishi Motors*, 473 U.S. at 638.

III. THE CIRCUITS ARE IN CONFLICT REGARDING THE PROPER STANDARD FOR ISSUING FOREIGN ANTI-SUIT INJUNCTIONS.

The decision below reaffirmed the Second Circuit's *China Trade* standard, which recognizes that anti-suit injunctions "effectively restrict[] the jurisdiction of the court of a foreign sovereign," and that, therefore, such injunctions must be "used sparingly" in due regard for international comity, *China Trade*, 837 F.2d at 35-36 (internal quotation marks omitted). *See* App. 16a-17a. Under this standard, the commencement of a foreign proceeding between the same parties "does not, without more, justify enjoining a party from proceeding in the foreign forum." *China Trade*, 837 F.2d at 36. Rather, the court first should consider whether the two actions share the same parties and whether the

U.S. action is "dispositive" of the foreign proceeding; if so, the court then should examine five factors in determining whether to issue an injunction. App. 16a-17a.

The Second Circuit's decision contributes to a recognized and substantial conflict among the circuits,[10] important to international commerce and foreign relations, regarding the standard under which a U.S. federal court may enjoin a non-U.S. lawsuit. The Second Circuit, like the D.C., Third, Sixth, and Eighth Circuits (and, to a lesser extent, the First Circuit), recognizes that an anti-suit injunction, in and of itself, impairs international comity. Its standard is fundamentally more restrictive than those circuits, including the Fifth, Seventh, and Ninth Circuits, that conclude that equitable factors such as the vexatiousness and oppressiveness of duplicative foreign litigation, which are likely to be present in any parallel proceeding, may be sufficient to override comity concerns.

The Second Circuit's standard is far broader, however, than the standard in the Third, Sixth and Eighth Circuits, because it considers such equitable factors, whereas these most restrictive circuits permit anti-foreign suit injunctions only when necessary to protect the jurisdiction of the U.S. court or to prevent evasion of an important public policy. Under that restrictive standard, the anti-suit

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[10] *See, e.g.*, *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17-18 (1st Cir. 2004) (describing circuit split).

injunction against Pertamina in this case should not have issued.

In all, nine federal circuits have weighed in on the proper standard for foreign anti-suit injunctions. They have applied fundamentally inconsistent standards, and reached fundamentally inconsistent results, in an area of great significance to the role of U.S. courts on the international stage. Absent review by this Court, this longstanding and intractable divergence will persist, and courts and litigants worldwide will remain uncertain as to the circumstances under which a U.S. court may enjoin foreign proceedings.

A. Six Circuits Apply Restrictive Standards of Varying Degrees.

A majority of the circuits holds that anti-suit injunctions should issue only in the rarest and most compelling circumstances. These courts emphasize that, even though such injunctions operate only on the parties, "they effectively restrict the foreign court's ability to exercise its jurisdiction," and thus necessarily implicate international comity. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

1. Three circuits apply the most restrictive test, considering only whether the foreign lawsuit threatens federal jurisdiction or impairs an important public policy.

Within this majority, the Sixth, Eighth, and Third Circuits are more restrictive than the others. The Sixth Circuit considers "*only* two factors" – protecting jurisdiction and important public policies of the forum – in determining whether an injunction may issue. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) (emphasis added). Similarly, the Eighth Circuit recently decided that the standard "should focus on (1) whether [the foreign action] . . . prevents United States jurisdiction or threatens a vital public policy, and (2) whether the domestic interests outweigh concerns of international comity." *Goss*, 491 F.3d at 361 n.4. The Third Circuit, while not expressly stating that those two factors are exclusive, has not recognized any other grounds that could, standing alone, justify restraining foreign litigation. *See Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127-29 (3d Cir. 2002); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001).

2. Three circuits – including the Second Circuit below – also consider other equitable factors.

In contrast, the D.C., Second, and First Circuits, in varying degrees, permit consideration of other

factors. Still, all three courts apply a strong presumption against anti-suit injunctions.

The D.C. Circuit holds that "[t]he equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice." *Laker Airways*, 731 F.2d at 927. Although it considers factors like preventing duplicative litigation and inconsistent adjudications, the court has noted that "[t]hese and other factors . . . do not usually outweigh the importance of permitting foreign concurrent actions." *Id.* at 928-29. The Second Circuit, though it recognizes that interference with jurisdiction and the forum's public policies assume "greater significance," has identified three other relevant considerations: whether the foreign action is vexatious; results in delay, inconvenience, expense, inconsistency, or a race to judgment; or prejudices "other equitable considerations." App. 16a-17a.

The First Circuit subscribes to the restrictive approach, but in a limited fashion, finding that it "evinces a certain woodenness." *Quaak*, 361 F.3d at 18. Adopting a "traditional approach," it holds that a court should presume that comity considerations prohibit an anti-suit injunction, but should consider "all the facts and circumstances" to determine whether that presumption is rebutted. *Id.* at 18-19.

Thus, even among those circuits that recognize the need for deference to foreign jurisdiction in all but the narrowest of circumstances, there is significant variation regarding how narrow that set of circumstances is.

B. The Fifth, Seventh, and Ninth Circuits Have Adopted a Permissive Standard.

The Fifth, Seventh, and Ninth Circuits do not require interference with jurisdiction or important public policies, and instead hold that factors relating to the duplication of the parties and issues, such as vexatiousness of multiple litigation, inconvenience, and expense, may be sufficient to justify an anti-suit injunction. *See Kaepa*, 76 F.3d at 626-27; *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 604-05 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981).

The Ninth Circuit inquires whether any of four factors it considers "instructive" (whether the foreign litigation frustrates a policy of the forum, is vexatious or oppressive, threatens the forum court's jurisdiction, or prejudices other equitable considerations) is present, and, if so, examines whether an injunction's "impact on comity is tolerable." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990-91 (9th Cir. 2006); *see also Seattle Totems*, 652 F.2d at 856 (enjoining Canadian litigation on bases of delay, inconvenience, expense, and potentially inconsistent rulings). Similarly, the Fifth Circuit focuses primarily on whether the parallel nature of the two proceedings results in "inequitable hardship" or frustrates speedy and efficient adjudication. *See Kaepa*, 76 F.3d at 626-27. Further, the Fifth Circuit has required a showing that an anti-suit injunction "actually threatens"

relations with the country where litigation is enjoined before comity considerations override the determination that the parallel litigation is vexatious. *Id.* at 627.

The Seventh Circuit "incline[s] toward the laxer standard" applied by the Fifth and Ninth Circuits, under which an anti-suit injunction can issue based on "nothing more than a duplication of the parties and the issues." *Bruetman*, 8 F.3d at 605-06. Like the Fifth Circuit, the Seventh Circuit presumes that the injunction will *not* impair international comity unless the opposing party offers "some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993).

C. Under a Proper Application of a Restrictive Standard, the Anti-Suit Injunction in This Case Cannot Stand.

Applying the standard articulated by the Sixth, Eighth and Third Circuits, the district court's anti-suit injunction against Pertamina should be reversed. The Second Circuit incorrectly found that the threat-to-jurisdiction, public policy, and "vexatiousness" factors supported the anti-suit injunction in this case, and, in so doing, took a more expansive view of those factors than earlier Second Circuit decisions and other circuits have.

The Second Circuit reasoned that Pertamina's Cayman action for fraud interfered with the federal

courts' jurisdiction because it sought to recover the same funds that the district court had ordered turned over to KBC. On the contrary, once the funds were turned over, the district court's jurisdiction had been fully satisfied and the district court's enforcement process had concluded.

Courts typically have found interference with jurisdiction of a level supporting an anti-suit injunction when the foreign court threatened to prevent the domestic court from rendering judgment or to carve out exclusive jurisdiction. *See, e.g., Quaak*, 361 F.3d at 20 (foreign action sought to "thwart[] the very discovery that the district court . . . deemed essential"); *China Trade,* 837 F.2d at 36-37 (anti-suit injunction may be appropriate to protect jurisdiction when foreign court is "attempting to carve out exclusive jurisdiction over the action," such as by "attempt[ing] to enjoin the [U.S.] proceedings" or seeking "to prevent the [district court] from exercising its jurisdiction over th[e] case"). In contrast, requesting relief from a foreign court, even where the same relief was not sought or was denied in the domestic court, is not a jurisdictional threat. *See Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1214 (D.C. Cir. 1989) (litigant's ability to repair to a foreign court with a lower standard "does not represent an evasion of forum law and policy that justifies injunctive relief") (internal quotation marks omitted); *Gau Shan*, 956 F.2d at 1356 ("The possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts . . . ."); *see also Goss*, 491 F.3d at 367 ("Although [the foreign suit] understandably is

objectionable to Goss, it does not threaten United States jurisdiction . . . .").

The Second Circuit further found that the Cayman action impairs the strong public policy in favor of international arbitration. Quite the contrary, as discussed above, it is the anti-suit injunction in this case that undermines the New York Convention's international arbitration regime. When acting as courts of secondary jurisdiction, with limited enforcement functions under the Convention, U.S. courts should be particularly hesitant to restrain foreign litigation to "protect" their judgments. *See Karaha Bodas*, 335 F.3d at 370. And, if the Cayman lawsuit truly were improper relitigation of the arbitration, the Cayman court would be perfectly capable of so deciding, based on applicable res judicata principles.

In addition to its erroneous application of the threat-to-jurisdiction and public policy factors, the Second Circuit also relied on a third factor – "vexatiousness" – in affirming the anti-suit injunction. Had it applied the more restrictive standard of the Sixth, Eighth and Third Circuits – which does not recognize "vexatiousness" as a ground for an anti-suit injunction – it might well have reached a different result. In any event, Pertamina's Cayman Action was not vexatious. Pertamina sought to raise its fraud allegations in appropriate fora soon after learning of them, pp. 8-9, *supra*. And while the Second Circuit suggested that Pertamina should have raised its fraud claim in the United States, instead of the Cayman Islands, *see* App. 33a-34a, there was no requirement that Pertamina do so,

and there is nothing vexatious about suing a litigant in its home jurisdiction.

D. The Circuit Split Generates Unpredictability in International Commerce and Increases the Likelihood that Foreign Courts Will Enjoin U.S. Litigation.

Over twenty years ago, the D.C. Circuit observed that "[t]here are no precise rules governing the appropriateness of antisuit injunctions." *Laker Airways*, 731 F.2d at 927. Today, that remains true and, beyond the lack of "precise rules," persistent disagreement about the standard pervades the case law on anti-suit injunctions.

The circuit split has genuine consequences for international commerce and relations. First, it injects unpredictability into international commerce, which "depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets." *Gau Shan*, 956 F.2d at 1355. A foreign entity doing business in the United States, and subjecting itself to *in personam* jurisdiction, has little ability to predict whether it might be enjoined from litigation in its own country, or elsewhere, on the basis of a parallel U.S. suit.

Second, the lack of a uniform policy that duly regards comity likely increases the willingness of other sovereigns to enjoin litigants from prosecuting U.S. actions, absent any assurance that our courts would exercise their injunctive authority sparingly. This, in turn, increases the likelihood that both the foreign court and the United States court will issue

injunctions, such that an "undesirable stalemate" in which both actions are paralyzed will occur, *Gau Shan*, 956 F.2d 1355, or that one court will disregard the injunction of the other. *Cf. Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067-69 (9th Cir. 2007) (refusing to stay a litigation that was enjoined pursuant to an English court's anti-suit injunction). The absence of clear guidance at a national level therefore debilitates cooperation and reciprocity with foreign courts exercising concurrent jurisdiction.

This Court should resolve this enduring conflict by articulating a single standard for anti-suit injunctions, one that gives due regard to the fundamental principle of comity to non-U.S. tribunals. In addition to eliminating circuit-dependent disparity in outcomes, such a standard will promote predictability and stability in international commercial transactions and will encourage foreign jurisdictions to exercise similar restraint in considering whether to enjoin U.S. litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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